Supreme Court, U.S.
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No. 06-1339

In the

Supreme Court of the United States

Yong-Qian Sun, Petitioner

v.

Board of Trustees of the University of Illinois, et al, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Reply Brief of Petitioner

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ARGUMENT

A. Respondents Rephrased the Questions in Violation of the Rules of This Court

In their Brief in Opposition to the Petition, Respondents rephrased the questions in violation of the Rules of the Supreme Court.

Rule 14.1(a) of the Rules of the Supreme Court of the United States requires that the questions presented for review "should not be argumentative."

Respondents' rephrased Question 1 is blatantly argumentative. In rephrasing this question, Respondents stated that the reviews of the decision to terminate Petitioner were "independent", that the reviewers were "alert" and "mindful" of the allegation of impropriety, and that the termination decision was "reevaluated and rejected on five separate occasions." Insertion of these argumentative elements into the questions is in violation of Rule 14.1(a) of this Court.

Respondents' rephrasing of Question 2 also violates the rules of this Court. It is improper because it asks the Supreme Court to decide a cosmogonic matter: Is the Court of Appeals correct in affirming the District Court? Rule 14.1(a) of the Supreme Court requires that the question should be expressed "in relation to the circumstances of the case." Respondents' rephrased Question 2 is shapeless and in violation of Rule 14.1(a) because it has failed to specify the circumstance.

Petitioner respectfully submits that this Court consider the two questions as phrased by Petitioner, and reject the Respondents' inappropriate rephrasing of them.

B. The Seventh Circuit is Repeatedly in Conflict with This Court's Holding in *Price Waterhouse* and with Several Other Circuits

A mere two months after its decision of the present case, the Seventh Circuit again held, in *Brewer v. Board of Trustees of the University of Illinois*, 479 F3d 908 (7th Cir. 2007), that a higher-ranking manager's subsequent review of an adverse employment recommendation made by a culpable unit manager is by itself sufficient to insulate any illicit animus manifested by the recommending unit manager. *Brewer* involved the same defendants as this case.

In *Brewer*, Brewer's immediate supervisor, Thompson, made the recommendation to fire Brewer allegedly on account of his race. The Seventh Circuit, in affirming the summary judgment, held that the racial animus on the part of Thompson was immaterial because the final decision was made by a higher ranking officer, Hendricks, who reviewed and approved the termination recommendation forwarded by Thompson. The Seventh Circuit concluded: "Though Thompson, as Hendricks' assistant, might have effective control over some of Hendricks' decisions, the decision to fire Brewer was not one of them. Hendricks listened to the information Thompson relayed to her but did not simply rely on it." *Brewer v. Board of Trustees*, 479 F3d 908 (7th Cir. 2007).

Respondents concede in their Brief that the Seventh Circuit did not even make a reference to this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), a case Petitioner relied on heavily in the lower courts. In *Price Waterhouse* this Court found that the partners of the employer, though outside the decision-making chain, influenced the final decision through their comments forwarded to the final decision-maker, because "[a] negative comment, even when made in the context of a generally

favorable review, nevertheless may influence the decision-maker to think less highly of the candidate." (490 U.S. at 257, 109 S. Ct. at 1794, 104 L. Ed. 2d 268.)

Had the Seventh Circuit complied with this Court's holding in *Price Waterhouse*, it would have no choice but to conclude that Weaver's recommendation to Herman to terminate Petitioner is a motivating factor in Herman's titular decision to fire Petitioner, just as Thompson's recommendation to fire Brewer was a factor that motivated Hendricks to fire Brewer in *Brewer*. The Seventh Circuit's repeated use of higher-level review of adverse employment recommendations put in motion by culpable unit-level managers to insulate the illicit animus is in clear conflict with *Price Waterhouse*.

In their Brief in Opposition to Petition, Respondents forthrightly endorsed the lax standard used by the Seventh Circuit for insulating a unit manager's illicit animus, similarly as they (also as defendants) argued in the case of *Brewer*. If left uncorrected, such standard would mean that plaintiff employees in a multi-decision-maker employer, such as Brewer, Petitioner and numerous others, could not prevail in an employment decision unless there is evidence of illicit animus at all the decision-making levels. An employee ploughing at the unit level of a large employer, such as Petitioner and Brewer, commonly do not even interact with the titular higher-ranking decision-maker – how could there be evidence that the titular decision-maker also harbors an illicit animus directed at the impacted employee?

The Seventh Circuit's holding in this case and again in *Brewer* does not conform with the language in Section 703 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m) which provides:

"... an unlawful employment practice is

> established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Should the unit manger's termination recommendation (Thompson's in *Brewer* and Weaver's in the present case) be considered a motivating factor in the final decision made by the higher-ranking manager (Hendricks in *Brewer* and Herman in this case)? The Seventh Circuit, together with the Fourth and Eleventh Circuits, held that the review of the recommendation conducted by the higher ranking official is sufficient to insulate the illicit animus of the recommending manager from the final decision. (See *Brewer v. Board of Trustees,* 479 F3d 908 (7th Cir. 2007); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998); *Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001).) These and other decisions like them place these circuits squarely in conflict with the Second, Third and Ninth Circuits where the mere influence of the recommending manager over the final decision is sufficient for imputing to the employer the illicit animus manifested by the recommending manager. (See *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000); *Roebuck v. Drexel University*, 852 F.2d 715, 727 (3d. Cir. 1988); *Lam v. University of Hawaii*, 164 F.3d 1186, 1188 (9th Cir. 1999).)

The standard used by the Seventh Circuit is erroneous because it ignores the momentum carried by the initial recommendation, disregards the degree of autonomy given to the units within a hierarchical employer, and neglects the organizational loyalty among the managers within the same employer.

Petitioner respectfully submits that the use of internal managerial reviews for insulating the illicit animus of a recommending manager from the final decision, as in the Fourth, Seventh and Eleventh Circuits, is in conflict with this Court's holding in *Price Waterhouse* and with the language "a motivating factor" that the Congress introduced for proving illegal employment discrimination in Section 703 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m).

C. The Seventh Circuit Rewrote and Relaxed Discovery Sanction Rules in Contradiction to This Court's Holding in *National Hockey League*

In their Brief in Opposition to Petition, Respondents did not dispute that they did violate, repeatedly, court's discovery orders. They did not dispute that it was these violations, nothing else, that led to the entry of default against them. They further did not dispute that there was no good cause or a valid excuse for the violations. Respondents' only argument in opposing the petition is that their violations were so minor that the default judgment rendered as a result may be vacated without a showing of a good cause. (Pages 3 and 12, Respondents' Brief.)

In a game of tennis, an umpire makes an out call when he sees the ball falling outside the border of the tennis court irrespective of whether it is out by an inch or by a yard. Fair play demands that players play within the space delineated by the rules. In civil litigation, this space is delineated by the Rules of Civil Procedures. Rules that permit sanctions must be enforced with rigor, particularly those governing discovery when the facts underlying the merits are necessarily not yet fully before the court. When a discovery sanction ruling has been made pursuant to the Rules, to vacate it there must be good cause. The violator bears the burden of showing a good cause or a valid excuse for the violations.

In this case, the umpire - the District Court - made the call of default after careful deliberations and progressive sanctions: He first gave the Respondents repeated and unambiguous warnings coupled with monetary sanctions (Pet. A5); he then provided Respondents with detailed reasons and cited case-law for entering the default after the Respondents committed repeated violations (Pet. A7); he further gave the Respondents two opportunities to object to his call (Pet. A3,4). He then made the ruling of default judgment after these deliberations led him to conclude that the Respondents had, in violating his orders, "displayed willfulness, bad faith or fault." (Pet. A8.)

And yet the Seventh Circuit held that the District Court acted "improvidently" in entering the default against the Respondents. (Pet. A95.) In so doing, the Seventh Circuit rewrote and relaxed the discovery sanction rule set by the Supreme Court and by the Rules of Civil Procedures.

In *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976), this Court had articulated the seriousness of discovery violations justifying the entry of default or dismissal as a sanction: a single violation of a discovery order was serious enough to warrant the entry of such sanctions. Until the instant case, such was the standard adopted by the Circuit Courts of Appeals; see *Forsythe v. Hales,* 255 F.3d 487, 490-491 (8th Cir. 2001); *Williams v. Chicago Board of Education* 155 F.3d 853, 858 (7th Cir. 1998); *In re: Thomas Consolidated Industries, Inc.*, 456 F.3d 719 (7th Cir. 2006). The Seventh Circuit's holding in this case that the entry of default against the Respondents for repeatedly violating discovery orders was so harsh that it may be vacated without a showing of good cause is clearly in conflict with *National Hockey League* and other circuits.

What the Respondents asked for, and the Seventh Circuit

held, was to rewrite and relax the discovery sanction rules after Respondents had been found in violation of them. The Seventh Circuit not only acted in conflict with this Court's holding in *National Hockey League*, it further substituted its ruling for that of the District Court by applying the relaxed rule to a bygone violation.

Conclusion

The petition for writ of certiorari should be granted as to both of the questions as presented by Petitioner.

Respectfully submitted,

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